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Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

v.

UNITED TRANSPORTATION UNION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the United Transportation Union is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and twenty-one national and international unions having a total membership of approximately thirteen million five hundred thousand working men and women. Its affiliates include the Union involved in the instant case and many other unions representing railroad and airline workers as well. Nevertheless, the Federation has rarely filed briefs *amicus* in cases involving the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. 151 *et seq.* recognizing that they normally present special problems growing out of a "state within a state . . . [having] its own customs and its own vocabulary [which] lives according to rules of its own

making." Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J., 567, 569 (1937). However, it is our belief that the instant case is illuminated by basic propositions of law already fully developed by this Court in decisions construing the nature and effect of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, and that it touches vital interests safeguarded by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et. seq.* Since the AFL-CIO has been intimately associated with the development of these principles, and since the decision here may well have ramifications in situations not governed by the RLA, we venture an expression of our views as to the correct resolution of the problem presented.

ARGUMENT

FUNDAMENTAL FEDERAL LABOR LAW PRINCIPLES, ESTABLISHED BY THE RLA AND THE NORRIS-LAGUARDIA ACT, PRECLUDE THE ISSUANCE OF THE STRIKE INJUNCTION SOUGHT HERE

This is a "strike injunction suit" (Pet. Br. 24). It was filed *precisely at the juncture* (some four and one half years after service of the § 6 notices) when the process of negotiation, mediation, voluntary arbitration and conciliation, mandated by the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. 151 *et seq.*, had "work[ed] its way" through "the detailed framework to facilitate voluntary settlement" during which "neither party may unilaterally alter the status quo," *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969) and "both parties . . . [were therefore] relegated to self help . . . compulsory arbitration not being provided," *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244 (1966). And while the Company's substantive arguments focus on the duty to bargain in good faith, its Complaint and Motions for a Restraining Order and a Preliminary Injunction make it perfectly plain that the basic purpose of this litigation is to frustrate resort by the Union to its "ultimate sanction . . .

the strike," *ibid.* For the sole relief requested was the prohibition of union self help; no order requiring the Union to negotiate in good faith was sought (A. 8, 9, 11). Thus here as in *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 331 (1960):

> "According to the verified complaint filed . . . by the Company . . . 'This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike or work stoppage on plaintiff railroad.' Section 4 of the Norris-LaGuardia Act provides, however, that 'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of *any labor dispute* to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment;' . . . The main question in this case then was, and still is, whether this prohibition of the Norris-LaGuardia Act bars an injunction in the circumstances of this case." (Emphasis in original.)

The Company's theory to justify this extraordinary relief is (a) that the portion of § 2 First stating that the parties shall "exert every reasonable effort to make . . . agreements . . . and to settle all disputes" imposes a duty to bargain in good faith (Pet. Br. 12-14, 42-47, 60 n. 21); (b) that the courts are empowered to determine whether there has been a violation of that obligation (Pet. Br. 27-42, 47-78); and (c) that acceptance of these two propositions necessarily entails the conclusion that the courts are free upon finding bad faith bargaining to enjoin otherwise lawful self help (Pet. Br. 5, 24-25). Thus, the rhetoric of its position is carefully designed to focus attention on the issue of justiciability. The unique considerations raised by the fact that this is a "strike injunction suit" are noted and dismissed in the first two pages of a 55 page argument (Pet. Br. 24-25). This allows evasion of the substantial objections to the remedy sought by the Company.

To put the matter in perspective we shall therefore assume *arguendo* for the purposes of this brief that under the RLA the courts do have the power to enforce a duty

to bargain in good faith.[1] That assumption does entail the conclusion that some form of injunctive relief is available to require a party, which has failed to meet this obligation, to negotiate properly. That is the lesson of *Virginian Ry. v. Systems Federation*, 300 U.S. 515, 544-550 (1938), where this Court held that a refusal to treat could be remedied by an order requiring "the employer to meet and confer . . . to listen to [his employees] complaints, to make reasonable effort to compose differences . . ." But there is no decision of this Court holding that the courts also have the power to enjoin otherwise lawful self help on the ground that there has been a failure to bargain with that good faith which § 2 First requires. The Company's Brief to the court below, at p. 28, squarely recognized "[t]here is no Supreme Court decision involving the validity of a strike injunction bottomed upon a violation of Section 2 First." Thus this case raises a question of first impression under the RLA. It should be decided by affirmance of the lower courts' denial of relief. For the most fundamental principles of federal labor law preclude such injunctions—as we shall now demonstrate.

1. This Court has not developed an RLA law of good faith bargaining. The few asides which can be gleaned from the cases beginning with the *Virginian* (Pet. Br. 48-60) are so inconclusive that the lower courts are in disagreement as to whether such a body of law does, or should, exist compare, A. 222-228, with, *Piedmont Aviation v. ALPA*, 416 F.2d 633 (C.A. 4, 1969), *certiorari denied*, 397 U.S. 926. This does not mean that there is no relevant corpus of experience. Under this Court's guidance the National Labor Relations Board, and the Courts of Appeals, have explicated the command contained in §§ 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*

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[1] The forceful arguments demonstrating that the portion of § 2 First in question is not justiciable are fully developed in the Union's Brief. Since we agree fully with the points made there we do not repeat them in our presentation. Naturally, if the Union's arguments are accepted it would be unnecessary to reach the position developed herein.

that the parties covered by that statute shall "confer in good faith." Thus, mindful of the admonition that the NLRA "cannot be imported wholesale into the railway labor arena" and that even "rough analogies must be drawn circumspectly" we begin by turning to the "law developed during the more than 30 years of administering our most comprehensive national labor scheme" as "[t]his Court has in the past . . . for assistance in construing" the RLA, *Jacksonville Terminal*, 394 U.S. at 383. We do so because we believe that the NLRA development underscores two points of critical significance here.

First, the concept of good faith bargaining is by nature complex and elusive. It is all but impossible to cabin by definition. Where there has been bargaining, as opposed to a simple failure to treat, the conclusion that a party has failed to fulfill its obligations requires an essentially subjective determination grounded in a detailed study of the entire course of the negotiations. This complexity stems from a basic tension which characterizes both the RLA and the NLRA and which this Court explained in the following terms in *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 485-486 (1960):

> "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract . . .
>
> "But at the same time, Congress was generally not concerned with the substantive terms on which the parties contracted. Cf. *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, 318 U.S. 1, 6. Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground."

Because of the nature of the substantive law, administration of the good faith bargaining obligation is an extremely sensitive task which has proved difficult even for

"an agency with administrative expertise," cf., *Jacksonville Terminal*, 394 U.S. at 391-392. The NLRB has drawn the fire of Congress for allegedly having:

> "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concession an employer must make and of the proposals that he may or may not make," H.R. Rep. No. 245, 80th Cong., 1st Sess., 19 (1947).

Additional Congressional guidance and twenty-three years more experience have not noticeably advanced the state of the art. In the past month both the District of Columbia and the Fifth Circuits have had occasion, in opinions reversing the Board, to point out the subtleties involved in determining whether good faith bargaining has occurred:

> "There is evidence in the record from which to conclude that the Employer was not acting in good faith . . . the record reflects no glory on this Employer . . . At the same time it is well to point out that the negotiation of labor contracts is not a gentle art. Both labor and management have a great deal at stake when sitting down at a bargaining table and this is reflected in the language used and in the proposals advanced for consideration. This court and the Board each must remain aware of how difficult it is to capture the tone of such proceedings from an outside vantage point. What may appear to be an unreasonable, obdurate demand may be no more than the skillful practice of the negotiator's art, designed to wring concessions from the opposite side. Congress has excluded the Board from interfering in this process no matter how strongly it feels about the merits of the proposals under discussion.
>
> • • •
>
> "The Board is authorized to oversee and enforce the duty of employer and union 'to bargain collectively . . . in good faith,' but Congress has made it clear that the obligation of good faith bargaining 'does not compel either party to agree to a proposal or require the making of a concession.' 29 U.S.C. § 158(d) (1964). Since the statute involves no compulsion on either party to make a concession or agree to a proposal, then obviously the agency designated to execute the statute is without power to effect a similar compul-

sion. *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952). Thus it is a fundamental proposition of labor law that the Board's power in this sphere is rigorously limited; . . . This leads us to the crux of the problem in the instant case. If we accept the proposition 'that [section] 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements' (*N.L.R.B. v. Insurance Agents, supra*, 361 U.S. at 487) then we cannot give our approbation to the Board's finding that the Employer was guilty of bad faith bargaining if that finding is based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations. . . . [For] the Board [must be] careful to observe the distinction between, on the one hand, a permissible inference of bad faith drawn from the proposals the Employer advanced and, on the other hand, an impermissible attempt to compel the Employer to accept certain terms or make certain concessions, an attempt in violation of section 8(d) of the Act.

• • •

"This argument proceeds admittedly on a fine distinction, but the distinction was drawn not by us but by Congress and we have no alternative but to enforce it to the best of our ability." *Steelworkers* v. *NLRB (Florida Machine & Foundry Co.)*. — F.2d —, 75 LRRM 2790, 2792-2794 (C.A. D.C., Dec. 4, 1970); see also, *M.R.&R. Co.* v. *NLRB*, — F.2d —, 75 LRRM 2705 (C.A. 5, Nov. 24, 1970).[2]

Insurance Agents, and the cases following it, demonstrate that the duty to bargain in good faith does not provide a sound base for strike injunctions. This is particularly plain in regard to preliminary relief. The complexity

[2] While the Company (Pet. Br. 13-14) relies on the NLRA rule that "surface bargaining" is insufficient, it fails to note the large body of law applying that doctrine. These cases show both that the "surface bargaining" concept in particular resists further refinement, see e.g., *General Electric Co.*, 150 NLRB 192 (1964), *enforced*, 418 F.2d 736 (C.A. 2, 1969) *certiorari denied*, 397 U.S. 965, and that there is substantial doubt as to the validity of the Company's claim of a violation, see, e.g., *Philip Carey Mfg. Co.*, 140 NLRB 1103, 1104-1105 (1963), *affirmed in relevant part*, 331 F.2d 720 (C.A. 6, 1964), *certiorari denied*, 379 U.S. 888.

of the issue presented and the necessity to examine the entire course of the negotiations all but preclude the possibility of disciplined decision making at the temporary restraining order or preliminary injunction stage. And Frankfurter and Greene's The Labor Injunction (1930) teaches that where the standards are amorphous the tendency of the District Courts in labor disputes has been to grant preliminary relief with a free hand on the theory that maintenance of the status quo is an absolute value. Moreover, even after a full hearing a high percentage of District Court error must be expected. The ultimate conclusion that there has been a failure to bargain in good faith rests on an extremely subtle balance of considerations. Striking the proper balance requires a deep and continuing familiarity with normal bargaining practices. Because of the structure of our labor law, which largely bypasses the District Courts, few federal judges can be expected to possess the degree of knowledge required.

The foregoing points, going as they do to considerations of substantive law, would be valid even if this were not a "strike injunction suit." We emphasize them because the possibility of such an injunction so exacerbates these problems as to make a qualitative difference. The parties governed by any complex, subtle, and amorphous legal standard are always tempted both to structure their actions so as to strengthen their litigating posture, and to litigate with inadequate cause. For there is always a real possibility of carrying the day. The extent to which such manipulation of the legal process occurs depends on the potential rewards. Here they are particularly great: the opportunity to deprive an adversary of the right to utilize its ultimate sanction—self help; and even failing that ultimate goal the substantial reward of maintaining an economically advantageous situation while judicial consideration proceeds. Thus if the Company's position here is accepted it is a virtual certainty that every unsettled major dispute will be brought to the federal courts on allegations of bad faith bargaining. Depending on their comparative strength, and the advantages to be gained by further delay, either man-

agement or labor will always find it to their tactical interest to tie up their opponent; and given the nature of bargaining and of the governing law the development of a viable theory, and the drafting of a colorable complaint, will rarely present a problem. For as Professor Cox has noted, in discussing a proposal for final judicial settlement of emergency disputes:

> "In any difficult labor negotiations the parties' willingness to compromise hinges largely on the absence of acceptable alternatives. If there is any other recourse—if there is a way to buy time, or evade responsibility for making a concession—there is great pressure to choose the alternative," 113 Cong. Rec. 30350 (1967).

Indeed, given these pressures it is not too much to expect that an essential part of bargaining strategy will be to elicit statements, or actions, which appear to lend substance to the claim of a violation.

The facts of the instant case appear to support an inference that the deleterious process of bargaining with an eye to judicial preclusion of self help rather than with full attention to settlement of the dispute is already well under way. The incidents upon which the Company's claim rests occurred between March 1968 and June 1969 (Pet. Br. 12-14; A. 33-47). There was no attempt to put bargaining back on the track by seeking immediate relief in the form of an order requiring the Union to discontinue its allegedly illegal practices and to bargain properly. Instead these charges were held back, like an ace in the hole, until December 1969 when the Union's right to self help had matured. At that point they were unveiled in the service of an application for a strike injunction (A. 8, 9, 11).

As we have stressed, pp. 2-4, *supra*, and as the foregoing illustrates, the Company's concern is with precluding union self help. Its legal strategy to accomplish that end is to take it as given that an order returning the parties to the position they might have occupied but for the violation is the *only* proper remedy for a failure to bar-

gain in good faith. The second basic lesson of the NLRA experience is that this premise cannot withstand scrutiny.

Under the NLRA the normal remedy for this violation is an order to cease and desist bargaining in bad faith and to commence proper negotiations, see, e.g., *H. K. Porter* v. *NLRB*, 397 U.S. 99, 101 (1970). Indeed, even though the limitations of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.*, would not apply, see, § 10(h) of the NLRA, we are unaware of a single strike injunction based on a failure to bargain in good faith.[3] Thus, orders having a completely prospective effect are the norm under the NLRA. This Court underscored this fact just last term in *H. K. Porter*. There the employer failed to bargain in good faith on the issue of the checkoff of union dues. Its refusal to grant the unions request "was based on a desire to frustrate agreement and not on any legitimate business to grant the union's demand; reasoning that but for the vio- reason." On these facts the Board ordered the employer to grant the union's demand reasoning that but for the violation there would have been agreement, the employer having no good faith objection. The remedy decreed was therefore designed to put the union in the position it would have occupied if there had been no violation. See, 397 U.S. at 100-102, 107. This Court reversed, stating (397 U.S. at 107-109):

> "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. . . . In this case the Court [of Appeals] apparently felt that the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most im-

[3] Even where there is an illegal insistence on a non-mandatory subject of bargaining under *NLRB* v. *Borg-Warner*, 356 U.S. 342 (1958), the remedy is confined to an order to cease such insistence. If the party which violated the *Borg-Warner* standard also has a lawful demand on the table its right to engage in self help is left unimpaired, e.g., *Alpert* v. *ITU*, 161 F. Supp. 427 (D. Mass. 1960).

portant demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace that the Act is designed to further. But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."[4]

Just as the NLRB is limited to remedies which carry out the policies of the NLRA, the courts are limited to remedies which carry out the policies of the RLA and are consistent with so much of Norris-LaGuardia as is "reconcilable" with the RLA, *Trainmen* v. *Chicago R&I.R. Co.*, 353 U.S. 30, 40 (1957). In *H. K. Porter* the remedy sought was denied since it was found incompatible with the basic policy of "freedom of contract," 397 U.S. at 107-108. In the instant case the strike injunction sought is incompatible with the basic policy underlying the RLA's provision for a final 30 day "cooling off" period, and with the core purpose of Norris-LaGuardia.

2. Under the RLA, no less than the NLRA, "collective bargaining with the right to strike at its core, is the essence of the federal scheme," *Bus Employees* v. *Missouri*, 374 U.S. 74, 82 (1963). The central position of self help is inherent in the system of free collective bargaining fostered by both statutes:

> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The

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[4] *H. K. Porter* presented a far stronger claim for a "but for" remedy than the instant suit. In that case there was a rational predicate for the view that agreement would have been reached absent a violation. Here on the other hand, given the fact of 10 years of negotiation, arbitration, and conciliation, it is all but impossible to believe that the Union's alleged "surface bargaining" caused the failure to agree, compare, *Philip Carey Mfg. Co.*, 140 NLRB at 1104-1105.

> parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system . . ." One writer recognizes this by describing economic force as a 'prime motive power for agreements in free collective bargaining.' . . ." *Insurance Agents*, 361 U.S. at 488-489.

The critical role played by "the presence of economic weapons in reserve" in the bargaining process has caused this Court to stress the point that it is not permissible to strike such weapons from the parties' hands without a specific warrant from Congress. Any other rule would allow an administrative agency, or the courts, to exercise a "considerable influence upon the substantive terms on which the parties contract" since "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." And such influence is impermissible because "our labor policy is not presently erected on a foundation of government control of the results of negotiations." *Id.* at 490, see also, *H. K. Porter*, 397 U.S. at 102-104, 107-108.

It is a commonplace that the efficacy of self help is vitally affected by consideration of timing. There is "[n]o doubt [that] a union's bargaining power would be enhanced if it possessed . . . the power exclusively to determine when work stoppages should occur . . ." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 310 (1965). Acting on this insight Congress in the RLA focused its attention on setting the time at which the right to self help shall mature. Regulation of economic weapons is centered on the provisions, §§ 6, 5 First and 10, requiring preservation of the status quo from the inception of negotiations through the final 30-day "cooling off" period, *Shore Line* v. *Transportation Union*, 396 U.S. 142, 150-153 (1969), and relegating the par-

ties to self help at that point, *Jacksonville Terminal,* 394 U.S. at 378-380.[5] The National Mediation Board has emphasized that judicial action to expand or contract the final "cooling off" period is inconsistent with the congressional plan. It has stated, in the context of whether a second proffer of its services creates an added "cooling off" period, that:

> "'In controversies of the type which come before the Board under Section 5, First, successful termination through mediation or arbitration requires some willingness by the parties involved to adjust or compromise, the points in dispute. Realization that failure to achieve settlement will lead, or is likely to lead, to strike action at the end of a 30-day stand-still period puts upon both parties pressure to avoid the consequences of this kind of economic warfare, seriously injurious to each of them.
>
> "'Such pressure would be materially dissipated if the statute means that after the procedures specified by Section 5, First, have been pursued to the end without avail, a subsequent proffer by the Board of its mediation services on the eve of a strike requires a repetition of these procedures and a second 30-day waiting period following notification of termination of the Board's emergency mediatory efforts. The parties would be aware that failure to effect settlement would not necessarily bring matters to a head 20 days thereafter. There would be the expectation that a strike called following termination of the required 30-day stand-still period would lead to a proffer of emergency mediation, and a repetition of the section's procedures and a second 30-day stand-still period.'" *Pan American World Airways* v. *Flight Engineers,* 306 F.2d 840, 848 (C.A. 2, 1962); see also, Memorandum for the National Mediation Board as *Amicus Curiae* in *Railroad Telegraphers,* No. 100, October Term 1959, pp. 4-10.

Thus, Congress has placed a limit on "the purposely long and drawn out proceedings" of the RLA, *Florida E.C.R.*

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[5] Congress has, of course, legislated *ad hoc* exceptions to this, and other, features of the RLA. These, however, do not form a predicate for judicial decision, *Jacksonville Terminal,* 394 U.S. at 379.

Co., 384 U.S. at 246, by enacting a "fixed cut off date," *Pan American Airways*, 306 F.2d at 846, for the moratorium on the use of self help. It has done so not because economic strife is of value in and of itself but because experience has made it plain that in the last analysis settlements are brought about by "pressure to avoid the consequences of economic warfare, seriously injurious" to the parties, compare, *Insurance Agents*, 361 U.S. at 489. The "fixed cut off date" established by the RLA is a basic incentive for settlement. It serves to maximize the pressure on the parties to settle by making it manifest to them that once the final "cooling off" stage has been reached matters will come to a head at a point certain. This is vital for in Professor Cox's words "in any difficult labor negotiation the parties' willingness to compromise hinges largely on the absence of acceptable alternatives," see, p. 9, *supra*.[6]

In reality then, the Company's position here, which is presented as a bulwark for peaceful settlement of "major" disputes, cuts against that object. It is designed to substitute a flexible cut off date set by the judiciary on a case by case basis for the "fixed cut off date" provided in the RLA. That, of course, would dissipate the pressures for settlement Congress was careful to enhance. The result would be to destroy the equilibrium of forces harnessed in the elaborate design of the RLA. The means proposed to achieve this result is the one this Court recognized as impermissible in *Insurance Agents*. The basic teaching of that case is that the power to oversee the duty to bargain in good faith may not be utilized as a charter to interdict the use of otherwise lawful economic weapons, see, 361 U.S. at 497-500. Yet here the Company seeks regulation of self help on the sole ground that the RLA's requirement of good faith bargaining justifies such regulation. The in-

[6] While this is the most clear cut and important limitation on judicial control of the timing of self help, it does not stand alone. The pace at which "major" disputes move through the RLA's processes is determined by the parties, the NMB, and the Executive, and the judiciary's power of review is narrowly circumscribed, see, e.g., *Machinists* v. *NMB*, 425 F.2d 527 (C.A. D.C., 1970).

evitable consequence of acceptance of its view would be an impermissible "intrusion into the substantive aspects of the bargaining process," *Insurance Agents*, 361 U.S. at 490. For this Court recognized in *Jacksonville Terminal*, 394 U.S. at 380-381, that:

> "The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a [court] would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike."

Thus, on purely RLA grounds issuance of a strike injunction in the instant case would contravene the basic principles recognized in both *H. K. Porter* and *Insurance Agents*.

3. Norris-LaGuardia embodies a "'government hands off' philosophy of labor relations," Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment On Sinclair* v. *Atkinson*, 72 Yale L.J. 1547, 1555 (1963). The RLA and the NLRA on the other hand embody a philosophy of *limited* governmental regulation. This Court has, therefore, concluded that since:

> "this shift in emphasis was accomplished . . . without extensive revision . . . of the anti-injunction section of the Norris-LaGuardia Act . . . it became the task of the courts to accommodate, to reconcile the older statute with the more recent ones," *Boys Markets* v. *Local 770 Retail Clerks*, 398 U.S. 235, 251 (1970).

There can be no doubt that "accommodation," as used in *Boys Markets*, is not a soft euphemism for complete obliteration of Norris-LaGuardia. The holding of that case is "a narrow one," *ibid.*, which allows injunctions only against breach of contract strikes over disputes subject to final and binding arbitration. The vitality of *Local 795 Teamsters* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962) holding that all other breach of contract strikes are

not enjoinable, remains unquestioned. And in the RLA context, which provided the genesis of the accommodation doctrine, this Court has emphasized the continuing relevance of Norris-LaGuardia:

> "The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U.S. 515, *Graham* v. *Brotherhood of Locomotive F. & E.* 338 U.S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *Machinists* v. *Street,* 367 U.S. 740, 772-773 (1961).

The "core purpose of Norris-LaGuardia" *Boys Markets,* 398 U.S. at 253, was succinctly stated in *Chicago River,* "the leading example of [the] accommodation process," 398 U.S. at 251:

> "The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital." 353 U.S. at 40.

Moreover, the legislative history of Norris-LaGuardia demonstrates that such injunctions were disfavored not only as a matter of social policy, but also because they were the product of "free wheeling judicial exercises," *Jacksonville Terminal,* 394 U.S. at 382, "which made the lawfulness of a strike depend upon judicial views of social and economic policy," *Boys Markets,* 398 U.S. at 253 n. 22. In sum, Norris-LaGuardia rests on, and safeguards, essentially those considerations articulated in *Insurance Agents*—in a system in which there is no "government control of the results of negotiation" regulation of the use of economic weapons "on very general standards not drafted with reference to

specific forms of economic pressure" is impermissible because it amounts to an "entrance into the substantive aspects of bargaining to an extent Congress has not countenanced," 361 U.S. at 490, 497.

The instant case is a paradigm of the situations to which Norris-LaGuardia was intended to apply. The Company's object is to enjoin a "major" dispute strike. That strike was undertaken only after all the provisions of the RLA which speak directly to the timing of self help had been satisfied. The standard which is said to justify the injunction against this otherwise lawful self help is complex, elusive, and amorphous, and by its nature calls for highly subjective judgments, see, pp. 5-8, *supra*. The inevitable result of an injunction will be to upset the natural interplay of competing economic forces to the detriment of labor, and the advantage of capital, compare, *Chicago River*, 353 U.S. at 40.

There is not a single consideration of substance which cuts against the application of Norris-LaGuardia here. This is not a case in which a strike injunction is necessary on the ground that "that remedy alone can effectively guard the plaintiff's right," *Street*, 367 U.S. at 773. We recognize, on the authority of the *Virginian*, that if § 2 First is justiciable an injunction requiring good faith bargaining is permissible and, of course, may be sought at any stage either prior to or after the point at which the right to self help matures. For such limited injunctive compulsion does not invade the "core purpose of Norris-LaGuardia." That relief, the NLRA norm, "can effectively guard the plaintiff's right" especially if sought expeditiously prior to the time self help is permissible. And such expedition is of course desirable and to be encouraged. Moreover, the experience under the NLRA shows that there is nothing to the view that as a matter of logic a violation of the duty to bargain in good faith mandates an injunction against self help. The NLRA law has grown to maturity without that device. Indeed, any doubt which might possibly remain is removed by the drafters' understanding, which was that to the extent § 2 First was enforceable, court action would

be "consistent with the judicial powers and its limitations" and that "the law for . . . compulsion . . . should be developed by the courts." Hearings On H. R. 7180, 69th Cong. 1st Sess., 40 (1926; Testimony of Donald R. Richberg), see also, 67 Cong. Rec. 4584 (1926; Remarks of Cong. Newton). Thus § 2 First can hardly be said to embody a congressional command for the issuance of strike injunctions.

Finally, contrary to the Company's claim (Pet. Br. 24-25) it is plain that this Court has never sanctioned injunctive relief at odds with the "core purpose of Norris-LaGuardia." The *Virginian* had nothing to do with the regulation of economic weapons. The purposes of Norris-LaGuardia were so inapposite in the *Steele* cases that the Court was moved to state that application of the anti-injunction provision "would indeed be 'to turn the blade inward,'" *Graham* v. *Locomotive Firemen*, 338 U.S. 232, 237 (1949). And both *Chicago River* and *Boys Markets* dealt with disputes subject to final and binding arbitration. When a strike is enjoined in that situation:

> "The union is not subjected . . . to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed [or under the RLA which have been explicitly set by Congress]. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." *Boys Markets*, 398 U.S. at 253 n. 22.

Thus, such controversies "are not the same as [the instant one] in which the injunction strips labor of its primary weapon without substituting any reasonable alternative," *Chicago River*, 353 U.S. at 41.

The sum of the matter is this: the theory of accommodation precludes strike injunctions in disputes which must be settled by free collective bargaining rather than final and binding arbitration, unless there is a clear and definite mandate from Congress requiring their issuance. Such in-

nctions are contrary to the "core purpose of Norris-
aGuardia," are not justified by the policies of the NLRA
RLA, and would therefore "undermine the vitality of
e Norris-LaGuardia Act," *Boys Markets,* 398 U.S. at
3. This being so affirmance of the result reached below
required.

CONCLUSION

For the above stated reasons the lower courts' denial of
e strike injunction sought here should be affirmed.

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December, 1970.